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Duress—Busines Compulsion—Recovery of Payments; Husband and Wife—Confidential Communications; Husband and Wife—Liability for Expenses of Last Illness and Funeral; Statutes—Construction—Emergency Relief Legislation; Torts—Negligence—Last Clear Chance

G. V. P.

was overcome as a matter of law in a New York case where such testimony was uncontradicted and unshaken.[21]

However, it has been held that interested testimony will not warrant an instructed verdict for the defendant,[22] and since the jury is not bound to believe the testimony of such witnesses, a verdict against such evidence will not be set aside.[23] But when the court says that it is still a question for the jury every time the defendant puts in interested testimony, the court forsakes its usual duty of determining whether the defendant's evidence has destroyed the plaintiff's prima facie case. In every other situation the court is competent to decide whether the testimony is such that a verdict might be directed for the defendant, but in this situation the presence of "interested" witnesses somehow renders the court incapable of deciding whether the defendant is entitled to a verdict.

Ordinarily the office of a presumption is merely to have the defendant proceed with the evidence, and when he has put in credible evidence that is at least entitled to some weight, the presumption should disappear and the parties should have the case decided on the evidence as given. Such a method of dealing with presumptions would seem to be fulfilling their purpose. But in the *McMullen v. Warren Motor Co.* case, the court held that the presumption was still a part of the plaintiff's case even though the defendant had put in the testimony of interested witnesses. There seems to be no logical reason why this presumption as such should not be removed from the trial when the defendant has introduced evidence to offset it. To require the defendant to produce disinterested testimony before the presumption will be met is placing a burden on the defendant which will almost always prevent him from prevailing. PAUL M. GOODE.

[21] *Powers v. Wilson*, 203 App. Div. 232, 196 N. Y. S. 600 (1922).
[22] *Kneff v. Sanford*, see note 17, *supra*.
[23] *Purdy v. Sherman*, 74 Wash. 309, 133 P. 440 (1913) *Mitchell v. Churches*, 119 Wash. 547, 206 P. 6 (1922).

RECENT CASES

DURESS—BUSINESS COMPULSION—RECOVERY OF PAYMENTS. The plaintiffs leased a service station from the defendant Associated Oil Company, agreeing to handle defendant's products exclusively. The lease was for ten years from March 3, 1928, and contained an option to purchase. In February, 1929, the parties entered into a contract for the purchase of gas and oil. From July, 1929, to May, 1931, the plaintiffs were overcharged by the defendant for their gasoline, but paid under protest. This action was begun in May 1931, to recover the amount plaintiffs had paid in excess of the contract price. The court held that the plaintiffs could recover, since they had to pay or suffer a forfeiture of their lease. The payments were held to have been made under business compulsion, *Ferguson v. Associated Oil Company*, 74 Wash. Dec. 5, 24 Pac. (2) 82 (1933).

In recent years the law of duress has undergone a great change. As first announced, the rule was that payments could be recovered because of duress only if actual physical harm to the payor had been threatened. This was followed by the doctrine of "duress of goods," which was that a payment made to release one's property from an unlawful detention was made under duress. *Lonergan v. Buford*, 148 U. S. 581, 37 L. Ed. 569 (1893). The modern rule is much more liberal, holding that if the payor

was deprived of his freedom of will, the payment was made under duress and may be recovered. *Brown v. Worthington*, 162 Mo. App. 508, 142 S. W 1082 (1912). This embraces the doctrine of "business compulsion," which is that if failure to make a payment would subject one to the loss of a capital investment, the payment is made under business compulsion and may be recovered. See 79 A. L. R. 655.

The Washington Court has recognized this doctrine. *Olympia Brewing Co. v. State*, 102 Wash. 494, 173 Pac. 430 (1918) *Sunset Copper Co. v. Black*, 115 Wash. 132, 196 Pac. 640 (1921) *Johnson v. Townsend & Co.*, 161 Wash. 332, 296 Pac. 1046 (1931) *Ramp Buildings Corp. v. Northwest Bldg. Co.*, 164 Wash. 603, 4 Pac. (2d) 507, 79 A. L. R. 651 (1931). See 7 Wash. L. R. 248. The instant case clearly falls within that rule, since forfeiture of the plaintiff's lease, with its option to buy, would be a loss of a capital investment. *Illinois Merchant's Trust Co. v. Harvey*, 335 Ill. 284, 167 N. E. 69 (1929) *Dale v. Simon*, 267 S. W 467 (Texas 1924).

A vigorous dissent in the instant case contended that the plaintiff should not be able to recover because he had continued to make these payments for so long a time. This overlooks the fact that the business compulsion continued, and was present at the time of each payment. The payment need not be disaffirmed until the removal of the duress. *Duke v. Force*, 120 Wash. 599, 208 Pac. 67 (1922). And it has been held that the making of such continuous payments does not prejudice the right to recover them. *Swift & Courtney & Beecher Co. v. United States*, 111 U. S. 22, 28 L. Ed. 341 (1898) *Kamonitsky v. Corcoran*, 161 N. Y. S. 756 (1916). G. V P.

HUSBAND AND WIFE—CONFIDENTIAL COMMUNICATIONS. In an action by W for alienation of affection maintained after H had married D, W on the stand testified that one morning at breakfast H had called her "Marie," D's name, and she had asked who Marie was. This was objected to. *Held*: W was incompetent to testify to the above, or to any other communication made by one to the other while the marriage relation existed, either while it subsisted or afterward, *Kirkpatrick v. Wickwire*, 25 Pac. (2) 371 (Kan. 1933).

The *Rev. Stat. of Kan.*, 60-2805, states, "The following persons shall be incompetent to testify (3) Husband and wife, for or against each other, concerning any communication made by one to the other during the marriage, whether called while that relation subsisted or afterward."

Most of the states do not have a statute phrased in terms of incompetency, but are similar to the Washington statute, *Rem. Rev. Stat.* 1214, which states, "The following persons shall not be examined as witnesses. (1) A husband shall not be examined for or against his wife without the consent of the wife, nor a wife for or against her husband without the consent of the husband, *nor shall either during marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during marriage.* But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other."

Thus the Washington statute contains three parts: (1) the common law incompetency to testify for or against the other, modified by permiting where consent has been given; (2) the privilege of the parties against communications made during marriage; (3) exceptions as to both.

Under the Kansas statute it is clear that "any communication" is privileged, and so it is held, *French v. Wade*, 35 Kan. 391, 11 Pac. 138 (1886). However, in the states having statutes similar to Washington there is a divergence of opinion concerning the meaning of the words "any communication." Some adopt the literal meaning and hold that "all communications" are barred; California, *People v. Mullings*, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223 (1890) Colorado, *Park v. Park*, 40 Colo. 354, 91 Pac. 830 (1907) Illinois, *Donnan v. Donnan*, 236 Ill. 341, 86 N. E. 279 (1908) Virginia, *Wilkes' Adm'r v. Wilkes*, 115 Va. 886, 80 S. E. 745 (1914), Oregon, *Pugsley v. Smyth*, 98 Ore. 448, 194 Pac. 686 (1921). Others hold that it is confined to "confidential communications" Iowa, *Sexton v. Sexton*, 129 Iowa 487, 105 N. W 314, 2 L. R. A. (n. s.) 708

(1905) Michigan, *Thayor v. Thayor* 188 Mich. 261, 154 N. W 32 (1915) Utah, *In re Van Alstine's Estate*, 26 Utah 193, 72 Pac. 942 (1903) and, Washington, *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819 (1901), *State v. Snyder* 84 Wash. 485, 147 Pac. 38 (1915).

The protection of the marriage relationship is the basis and purpose of these statutes. In view of the status of the parties the law deems it more advantageous to society to hold as confidential matters thus revealed, rather than to permit the parties to disclose them in open court. As a requisite for the application of the privilege four conditions should exist: (1) Communication must originate in a confidence that it will not be disclosed, (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) The relation must be one which in the opinion of the community ought to be sedulously fostered; and, (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation, WIGMORE ON EVIDENCE (2d Ed.), sec. 2285. The privilege is to secure freedom from apprehension of disclosure in the mind of the one desiring to communicate. WIGMORE ON EVIDENCE (2d Ed.), sec. 2340.

Thus it appears that the rule limiting the protection to confidential communications is the better rule, since there is no need to protect all communications, but only those given in confidence that they will not be ferreted out in public. And, since Washington holds the statute only applies to confidential communications, it may be questioned whether the court would hold the conversation in the instant case confidential. In *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819 (1901), the court held confidential communications to be "those induced by the marital relations." It is difficult to see how a husband's slip of the tongue was "induced by the marital relations."

Granting that the privilege exists, it is generally held to be the personal privilege of the one making the communication, and thus, being personal, can only be waived by him. *Derham v. Derham*, 125 Mich. 109, 83 N. W 1005 (1900) *State v. Snook*, 93 N. J. L. 29, 107 Atl. 62 (1919) (attorney and client) WIGMORE ON EVIDENCE (2d Ed.), sec. 2196. Hence it would appear that in an action against a third party where W claims the marital privilege, if the court denies it, and the third party objects, the overruling of the objection should not be sufficient grounds for a reversal and a new trial, since the evidence is otherwise admissible. And, it has been so held. *Coles v. Hursch*, 129 Ore. 11, 276 Pac. 248 (1929) *State v. Snook, supra,* WIGMORE ON EVIDENCE (2d Ed.), sec. 2196. The Oregon court, in facts similar to the instant case, held that where the possessor of the privilege objects the court must exclude the privileged communications, and that any court may exclude them upon its own motion when it appears that a witness is about to testify to a privileged communication, but that a denial of the privilege will not be grounds for a new trial where the exception is taken by a third party.

Wigmore explains this by saying that since the offered testimony is relevant, the only interest injured is that of the witness, and not the third party. If the witness desires to prevent disclosure, he should refuse to testify, and upon being committed for contempt sue out a writ of habeas corpus. He admits, however, that the majority view is contra and gives the third party against whom the testimony is offered grounds for reversal and a new trial.

It is difficult to find any real protection if the rule laid down by Wigmore, and followed by some courts, is adopted. Chafee, in 35 Harv. L. Rev. 686, asserts that although the view taken by Wigmore is logically correct, it seems practically desirable to allow the party to take advantage of such a denial, for otherwise error by the court will not be sufficiently checked, since if the court rules in his favor (party objecting) evidence will be excluded to the injury of the offering party who can except, while if the opponent cannot except to a denial of the privilege, the court will be tempted to deny it and avoid the chance of a reversal. Also, very few witnesses will be willing to subject themselves to contempt proceedings, and possible imprisonment if the doubtful point of privilege is decided against them. They will rather testify and, as pointed out in a dissenting

opinion in *State v. Snook*, 94 N. J. L. 271, 109 Atl. 289 (1920), it thus becomes necessary to a preservation of the privilege that an erroneous affirmation or denial of the privilege shall be grounds for a new trial, both by a party against whom an erroneous affirmation was entered, and by a party against whom an erroneous denial was entered, although a third party.

Washington apparently follows the majority view. In *Hartness v. Brown*, 21 Wash. 55, 59 Pac. 491 (1899), a case involving the attorney and client privilege, which is comparable to the confidential communication privilege between husband and wife, the court holds that, in the interest of sound public policy, the objection can be made by anyone against whom the evidence is offered, although the privilege is for the benefit of the client, and he alone can waive it.

Therefore, in Washington, we find: (1) that the privilege only exists as to "confidential communications;" (2) that it is a privilege in favor of the communicating one, and he alone can waive it; and, (3) that if offered against a third party, he may object in the interest of sound public policy, and a denial of the privilege will be ground for reversal.

C. P. Z.

HUSBAND AND WIFE—LIABILITY FOR EXPENSES OF LAST ILLNESS AND FUNERAL. The inheritance tax appraiser refuses to allow deduction from the estate of W for reimbursement of H., who has paid the expenses of W.'s last illness and funeral from his own funds. H. protests on ground that the inheritance tax statute expressly provides that such expenses shall be deducted before the imposition of the tax. *Held*: The items are not deductible; H. is primarily liable therefore, and the estate of W. only secondarily liable. *Riley, Controller v. Robbins et al.*, — Cal — 25 Pac. (2d) 539 (1933).

At common law, medical attention was one of the "necessaries" which the marital relationship required the husband to furnish. He was likewise chargeable with the expense of the wife's proper burial; her separate estate was not liable therefor. 31 *A. L. R.* 1500. (Cases collected).

The majority of jurisdictions in the United States follow the common law rule. *Re Werinyer*, 100 Cal. 345, 34 Pac. 825 (1893) *Stonesifer v. Shriver* 100 Md. 24, 59 A. 139 (1904) *Stone v. Tyack*, 164 Mich. 550, 129 N. W 694 (1911). And the rule is applicable although the parties were living apart at the time the expenses were incurred. *Scott v. Carothers*, 17 Ind. App. 673, 47 N. E. 389 (1897) *Barnes v. Starr* 144 Md. 218, 124 A. 922 (1923). Even a divorce suit pending between them does not seem to relieve the husband from liability. *Gleason v. Warner*, 78 Minn. 405, 81 N. W 206 (1899). Nor do statutes making last illness and funeral expenses charges or preferred claims against the estate, change the rule in these jurisdictions. *Kenyon v. Brightwell*, 120 Ga. 606, 48 S. E. 124 (1904) *Rocap v. Blackwell*, 137 N. E. 726 (Ind. App. 1923)

Of course, the wife may assume the liability by contract in jurisdictions where married women have that power. *Bowen v. Daugherty*, 168 N. C. 242, 84 S. E. 265 (1915). Or she may make such provision in her will. *Rocap v. Blackwell*, 137 N. E. 726 (Ind. App. 1923). And in many jurisdictions following the common law rule, the wife's estate is held secondarily liable, especially where the husband is financially unable to pay. *Smyley v. Reese*, 53 Ala. 80, 25 Am. Rep. 598 (1875) *Re Werinyer* 100 Cal. 345, 34 Pac. 825 (1893).

There is, however, an increasing minority holding the estate of a married woman liable for the expenses of her last illness and funeral. Courts which reach this result do so generally on the basis of statutes making either one or both items charges or preferred claims against the estate. 31 *A. L. R.* 1500. (Cases collected). Under this rule the husband is entitled to reimbursement from the wife's estate if he pays these expenses with his separate funds. *Constantinides v. Walsh*, 146 Mass. 281, 15 N. E. 631 (1888) *Watkins v. Brown*, 89 App. Div. 193, 85 N. Y. Supp. 820 (1903).

Washington has adopted the minority view. Our statute makes both last illness and funeral expenses preferred claims against the decedent's estate. *Rem. Rev. Stat.*, sec 1541. Thus a physician may bring an action against the estate of a decedent for services rendered during his last illness irrespective of contract. *Cunningham v. Lakin*, 50 Wash. 394, 97

Pac. 447 (1908). And a husband who has paid the expenses of his wife's last illness with his own funds is entitled to reimbursement from her separate property by virtue of the statute. *Smith v. Eichner* 124 Wash. 575, 215 Pac. 27 (1923). So too where the parties are living under separation agreement. *Parsons v. Tracy*, 127 Wash. 218, 220 Pac. 813 (1923). The rule is the same with regard to funeral expenses. *Smith v. Saul*, 128 Wash. 51, 221 Pac. 977 (1924).

Where the husband leaves no property, the wife is liable for his funeral expenses if they are rendered with her knowledge and consent. *Butterworth v. Teale*, 54 Wash. 14, 102 Pac. 768 (1909). But her liability is only secondary. *Butterworth v. Bredemeyer*, 74 Wash. 524, 133 Pac. 1061 (1913) And since the primary liability is on the estate under the statute, the creditor must exhaust his remedy against the primary fund before he can resort to the secondary. *Butterworth v. Bredemeyer, supra.* Of course, an express promise to pay the expenses of a funeral will create a primary liability against the person so promising. Nothing less than an express promise will create the liability, however. Direction to furnish service is not enough. *Butterworth v. Bredemeyer supra.*

The question of whether deduction may be made for expenses of last illness and funeral before imposing the inheritance tax does not seem to have arisen in Washington. In general, deductions for such are held good under inheritance tax laws. 9 *A. L. R.* 671. (Cases collected). Our inheritance tax statute reads: " shall be subject to a tax ., after the payment of all debts owing by the decedent at the time of his death and a reasonable sum for funeral expenses " *Rem. Rev. Stat.*, sec. 11201. Read in conjunction with the statute making such expenses preferred claims against the estate, it seems clear that these are properly deductible. In view of the foregoing Washington decisions and the wording of the statutes on the subjects, it would appear that given the same facts as the principal case, *Riley v. Robbins et al.*, a contrary result would be reached in this jurisdiction. M. W

STATUTES—CONSTRUCTION—EMERGENCY RELIEF LEGISLATION. Application for a writ of mandate to compel the state auditor to issue a warrant on the state treasury in favor of the treasurer of Thurston County in payment of a voucher for expenses incurred by that county in the administration of direct or home relief. Direct relief as distinguished from work relief is defined by statute in *Wash. Rem. Rev. Stats. Ann.* 1933, sec. 9992-1 to 9992-34, inclusive, as shelter, food, clothing, and household supplies, while work relief is defined as wages paid for the performance of services or labor under the emergency construction program. A Special Emergency Relief fund was created, twenty thousand dollars being the initial appropriation for the carrying out of the provisions of the act. By the provisions of *Wash. Rem. Rev. Stats. Ann.*, 1933, sec. 9992-35 to 9992-40, inclusive, a bond issue was authorized, the proceeds to be deposited in the special emergency fund, ten million dollars being appropriated immediately for *construction work for unemployment relief.* (Italics ours.) Defendant resisted the issuance of the writ by arguing that no part of the ten million dollar bond issue had been appropriated for the furtherance of home relief. *Held*: writ of mandate granted. *State ex rel. Draham v. Yelle*, 75 Wash. Dec. 28, 26 Pac. (2d) 622 (1933.)

A cursory reading of the statute raises the question whether or not the words "for construction work for unemployment relief" limit the use for which the ten million dollar bond issue is to be expended. In the instant case the court adopts the plaintiff's contention that the bond issue was to finance a general relief program and not merely a "work relief" program. In so construing the legislative intent, the majority of the court must interpret the phrase "for construction work *for* unemployment relief" as if it read "for construction work *and* unemployment relief," giving to the phrase "unemployment relief" the same meaning as "home relief." To achieve this result the court relies on dictum from an earlier case under the same statutes and a line of Washington cases in harmony with the implications to be derived from the dictum. In *State ex rel Hamilton v. Martin*, 73 Wash. Dec. 158, 23 Pac. (2d) 1 (1933) the court said, "The relief act, which is interrelated with and referred to in the bond act, has for its purposes, as determined by its title, first, to relieve the people of the state from hardships and suffering caused by

unemployment, which is identical with one of the objects sought to be obtained by the enactment of the bond act." Beginning with *Davidson v. Carson*, 1 Wash. Terr. 308 (1870), the Washington court has held that acts passed at the same session of the legislature and relating to the same subject matter, are in *pari materia* and must be construed together, so that, if possible, a proper and harmonious effect may be given to all of them, although they contain no reference one to another and were passed at different times. *Pierce County ex rel Maloney v. Spike*, 19 Wash. 652 (1898) *State ex rel Miller v. Griffin*, 46 Wash. 489, 90 Pac. 661 (1907) *White v. North Yakima*, 87 Wash. 191, 151 Pac. 645 (1915).

A statute should be construed as a whole and most reasonably to accomplish the legislative purpose. *State ex rel Chamberlin v. Daniel*, 17 Wash. 111 (1897) *Dennis v. Moses*, 18 Wash. 537 (1898). A statute should be construed in the most beneficial way, to favor public convenience and to oppose all prejudice to public interests. *State ex rel McKenzie v. Forrest*, 11 Wash. 227 (1895).

It is expressly provided that the relief act should be liberally construed to the end that the work of the administration should be succesful in allaying the misfortune. *Wash. Rem. Rev. Stats. Ann.* 1933, sec. 9992-28.

The dissenting judges adopt a literal interpretation of the phrase "for construction work for unemployment relief," declaring it to be the purpose of the court to declare the law as it is written and not to rewrite a statute or dictate the policy that the legislature should pursue. This is tersely phrased, "The Legislature said what it meant and meant what it said."

To support its conclusion, the minority relies on a rule of statutory construction as firmly embedded in Washington law as that relied on by the majority to reinforce its conclusions. The history of a legislative measure may be reported to, in order to aid in its interpretation. *Howlett v. Cheetham*, 17 Wash. 626 (1897 *Scouten v. City of Whatcom*, 33 Wash. 273, 74 Pac. 389 (1903) *State ex rel Fair v. Hamilton*, 92 Wash. 347, 150 Pac. 379 (1916) *Stovell v. Toppenish School District No.* 19, 110 Wash. 97, 188 Pac. 12 (1920). Reference to the legislative history of the instant statutes indicates that the restrictive feature of *Wash. Rem. Rev. Stats. Ann.* 1933, sec. 9992-37, was added by way of amendment after a discussion of the evils of the dole form of direct relief.

To read the provision "for construction work *and* unemployment relief" would alter the meaning of the section and bring it within the constitutional admonition that appropriation measures should specify the object of the appropriation. *Article VIII, Sec.* 4, *of the Constitution of the State of Washington.*

The sharp division of the court indicates a conflict between two lines of statutory construction. While the exigencies of the present situation seem to demand a decision in keeping with that of the majority, the adoption of such a rule of statutory construction as the general rule to be followed in future cases would mean the establishing of an unfortunate precedent. M. A. M.

TORTS—NEGLIGENCE—LAST CLEAR CHANCE. Decedent was walking on the right hand side of the highway, in violation of statute (Rem. Rev. Stat., sec. 6362-41). Defendant, coming from behind in an automobile, was driving at an excessive rate of speed and in a negligent manner. Defendant saw decedent and sounded the horn several times. Decedent, who was wearing a woolen cap pulled down over his ears, did not hear the horn, and defendant was aware that he did not hear. Decedent was struck and killed. The court refused to give instruction on last clear chance, and plaintiff appeals. *Held*: That the court should have instructed on the conscious form of the doctrine. *Flagg v. Vander Yacht et al.*, 74 Wash. Dec. 475, 24 Pac. (2d) 1063 (1933).

The doctrine of last clear chance, as applied in this jurisdiction, appears in two forms, the distinction being based on whether the defendant was conscious or unconscious of the plaintiff's position of peril.

In the conscious form, where the defendant actually realizes the plaintiff's position of peril in time to avoid the accident by exercise of due care, it is immaterial whether or not the plaintiff's negligence has ceased

at any point prior to the accident. *Brown v. Seattle City Ry. Co.*, 16 Wash. 465, 47 Pac. 890 (1897) *Leftridge v. Seattle*, 130 Wash. 541, 228 Pac. 302 (1924) *McAbee v. French*, 150 Wash. 646, 274 Pac. 713 (1929). The instant case properly applies this form of the doctrine, since defendant had actual knowledge of the plaintiff's position of peril in time to avoid the accident.

The unconscious form of the doctrine involves a situation where defendant is not actually aware of the plaintiff's position of peril in time to avoid the accident by exercise of due care, but is under a duty to so discover in time to avoid the injury However, before this form of the doctrine can be applied, it must appear that the plaintiff's negligence has come to rest an appreciable time before the accident, leaving the plaintiff in a helpless position. *Herrick v. Washington Water Power Co.*, 75 Wash. 149, 134 Pac. 934 (1913) *Lung v. Water Power Co.*, 144 Wash. 676, 258 Pac. 832 (1927) *Reese v. Tacoma Railway & Power Co.*, 148 Wash. 207, 268 Pac. 599 (1928). This helpless position must be based on physical inability to avoid the accident, and mere inadvertence is not sufficient. *Mosso v. Stanton Co.*, 75 Wash. 220, 134 Pac. 941 (1913) *Johnson v. Seattle*, 141 Wash. 385, 250 Pac. 409 (1926) *Larson v. Tacoma Railway & Power Co.*, 146 Wash. 660, 264 Pac. 419 (1928), though some of the cases have failed to make this distinction. *Chase v. Seattle Taxicab & Transfer Co.*, 78 Wash. 537, 139 Pac. 499 (1914) *Stephenson v. Parton*, 89 Wash. 653, 155 Pac. 147 (1916) *Settles v. Johnson*, 162 Wash. 466, 298 Pac. 690 (1931)

Since the doctrine of last clear chance applies only where the defendant has been negligent, and the plaintiff is guilty of contributory negligence, *Locke v. Puget Sound Int. R. & P Co.*, 100 Wash. 432, 171 Pac. 242, L. R. A. 1918D. 1119 (1918), it would appear to be an exception to the rule of contributory negligence. The basis for the doctrine suggested by the Washington court is that the contributory character of the plaintiff's negligence is removed, because defendant has the last clear chance to avoid the accident, and hence, his negligence is the proximate cause and plaintiff's a remote cause. *Herrick v. Washington Water Power Co., supra.*

However, it is submitted that proximate cause fails as a basis, since if a non-negligent third party were involved, he could doubtless recover from either plaintiff or defendant. 5 Iowa Law Bulletin 36. The doctrine could be better based on a frank admission that it is an exception to the sometimes harsh rule of contributory negligence. 26 Harv. Law Rev. 369, 2 Wash. Law Rev. 53, as applied in those situations where the defendant is in a better position to control than the plaintiff. It follows that the doctrine will not be invoked where the parties had equally good chances to control the situation. 66 Univ. Pa. Law Rev. 73. As applied in this jurisdiction, the doctrine is readily sustainable on the basis suggested.

R. E. Y.